

Office of Chief Counsel
Internal Revenue Service
memorandum

CC:LMSB:PHI:POSTF-165055-01,165058-01
ATAckerman

date: January 11, 2002

to: Internal Revenue Service
Philadelphia, PA
Attention: George Mullin, Team Manager
Tony Esposito, LMSB-1145

from: JAMES C. FEE, JR.
Associate Area Counsel
(Large and Mid-Size Business)

subject: [REDACTED]
Extension of Statute of Limitations - Forms 872

DISCLOSURE STATEMENT

This writing may contain privileged information. Any unauthorized disclosure of this writing may have an adverse effect on privileges, such as the attorney client privilege. If disclosure becomes necessary, please contact this office for our views.

This memorandum responds to your request for assistance dated November 29, 2001. This memorandum should not be cited as precedent.

ISSUE

How should the language on the Forms 872 (Consent to Extend the Time to Assess Tax) be phrased, so that the statute of limitation for assessment can be extended for the [REDACTED] Form 1120S of [REDACTED] Company and the [REDACTED] Form 1040 of its sole shareholder, Joseph A. Murphy,¹ on the restrictive issue of whether buying and selling [REDACTED] is a business or activity not engaged in for profit, under section 183 of the Internal Revenue Code ("I.R.C.")?

¹For purposes of this advice and recommendation, reference is made to the Form 1040 of [REDACTED], the sole shareholder of [REDACTED] Company. It should be noted that [REDACTED] files a joint return with his wife, [REDACTED] (who is not a shareholder), and that the consent form relating to the Form 1040 must be signed by both [REDACTED] and [REDACTED].

CONCLUSION

In order to extend the period of assessment for the [REDACTED] tax year of [REDACTED] Company and [REDACTED], the following language should be added to the preprinted Forms 872:

The amount of any deficiency assessment is to be limited to that resulting from any adjustment to ordinary income (loss) from trade or business activities claimed on page 1, line [REDACTED] and Schedule K of Form 1120S due to the application of I.R.C. section 183 to [REDACTED] Company's activity of buying and selling [REDACTED], and to the flow-through income (loss) from [REDACTED] Company to [REDACTED] (e.g., Schedule E of Form 1040), including any consequential changes to other Form 1120S and Form 1040 items based on such adjustment.

FACTS

It is our understanding that the Revenue Agent is examining the Form 1120S filed by [REDACTED] Company and the Form 1040 filed by its sole shareholder, [REDACTED], for calendar year [REDACTED]. As the [REDACTED] Form 1120S was filed on [REDACTED], the three year statute of limitation on assessment, under I.R.C. § 6501(a), expires on [REDACTED]. For the [REDACTED] Form 1040, the statute expires on [REDACTED], three years after the filing date.

The Taxpayer, for purposes of both the Form 1120S and the Form 1040, has indicated a willingness to extend the statute of limitation on assessment beyond the [REDACTED] and [REDACTED] dates, respectively. However, the Taxpayer wishes to restrict the statute extensions to the section 183 issue. See I.R.C. § 183. It is the Revenue Agent's position that the activity of buying and selling [REDACTED] is a [REDACTED] of [REDACTED]; and, therefore, the flow-through loss of approximately \$[REDACTED] from the [REDACTED] Form 1120S, deducted on the [REDACTED] Form 1040, should be disallowed. The Taxpayer's representative disagrees.

It is our understanding that you are requesting our assistance in providing the language necessary to restrict the extension to the section 183 issue, and that you will provide the Form 872 captioning and expiration dates.

ANALYSIS

Section 6501(a) of the Code provides the general rule that a tax must be assessed within 3 years from the due date of the return or the filing date, whichever is later. I.R.C. § 6501(a). However, it is often necessary to request extensions of the period of limitation in tax cases to provide adequate time for consideration of disputed issues.

Section 6501(c)(4) provides that where the Secretary and the taxpayer have consented in writing to the assessment of tax after the time prescribed in section 6501, the tax may be assessed at any time prior to the expiration of the period agreed upon. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon. Forms 872 serve the purpose of extending the period for assessment to a specified date.

A Form 872 consent may also be limited as to coverage of specific issues. The Service has ruled that a consent to extend the period of limitation may be restricted to one or more issues where such issues cannot be resolved within the normal limitation period, or prior extensions thereof, because of the need to await establishment of an interpretative position through court decision, regulation, ruling, or other National Office action. (Rev. Proc. 68-31, 1968-2 C.B. 917 as modified by Rev. Proc. 77-6, 1977-1 C.B. 539).

In order to be clear and without ambiguity, the following language should be added to the preprinted Forms 872:

The amount of any deficiency assessment is to be limited to that resulting from any adjustment to ordinary income (loss) from trade or business activities claimed on page 1, line [REDACTED] and Schedule K of Form 1120S due to the application of I.R.C. section 183 to [REDACTED] Company's activity of buying and selling [REDACTED], and to the flow-through income (loss) from [REDACTED] Company to [REDACTED] (e.g., Schedule E of Form 1040), including any consequential changes to other Form 1120S and Form 1040 items based on such adjustment.

This concludes our advice in this matter. We are forwarding a copy of this advice to Senior Litigation Counsel (HQ) (CC:LMSB:SLC) and to our National Office for mandatory ten day post review. We will promptly advise if we receive contrary advice from our National Office.

Please feel free to call Attorney Trevor Ackerman at 215-597-3442, if you have any additional questions.

JAMES C. FEE, JR.
Associate Area Counsel (LMSB)